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Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1644

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

YAMHILL YAMAHA, INC.,

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,

Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

YAMHILL YAMAHA, INC., an Oregon corporation; Plaintiff, v. YAMAHA MOTOR CORPORATION, U.S.A., a California corporation; BEAVERTON MOTORCYCLES, INC., an Oregon corporation, dba BEAVERTON HONDA; and DEAN COLLINS, Defendants.	Filed August 14, 1986 Civil No. 85-1930-FR ORDER
YAMHILL YAMAHA, INC., an Oregon corporation; Plaintiff, v. YAMAHA MOTOR CORPORATION, U.S.A., a California corporation; Defendant/ Counterclaim Plaintiff, v.	Civil No. 85-648-FR

ANDREW ERIC LaLACK III; ANDREW LaLACK, JR.; and MARK B. GREGSON;

Counterclaim-Codefendants.

Before: Frye, Judge

The matter before the court is the defendants' motion to strike plaintiff's notice of demand for trial by jury.

BACKGROUND

Plaintiff filed two actions in the Circuit Court of the State of Oregon for the County of Yamhill, which were subsequently removed to this court. Plaintiff alleges defendants engaged in price discrimination and coerced plaintiff into purchasing products.

The first action, Civil No. 85-648 was removed on April 15, 1985. Defendant filed an answer and counterclaim on May 8, 1985 and plaintiff replied to the counterclaim on September 3, 1985. On September 28, 1985, plaintiff filed the second action, Civil No. 85-1930, which was removed to this court on

November 5, 1985. On November 6 and 8, 1985, defendants filed answers.

On June 10, 1986, plaintiff filed a notice of demand for trial by jury.

DISCUSSION

Defendants move to strike plaintiff's jury demand on the grounds that the demand is untimely and that plaintiffs have therefore waived any right to jury trial.

Fed. R. Civ. P. 81(c) governs the applicability of the federal rules in removed actions. It provides in relevant part:

> (c) Removed Actions.
>
> These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. . . . If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not

> make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

However, where a civil action is removed to the federal court before all necessary pleadings have been served, Fed. R. Civ. P. 38 governing jury demands in ordinary federal civil actions is applicable. See e.g. Kalmanovitz v. G. Heileman Brewing Co., Inc., 610 F. Supp. 1319, 1327 (D.C. Del. 1985). Rule 38(b) provides:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

The notice of jury demand in these actions was filed seven to eight months after the last pleading directed to the action. Failure to file within the time provided constitutes a waiver of the right to trial by jury. Fed. R. Civ. P. 38(d).

IT IS HEREBY ORDERED defendants' motion to strike plaintiff's jury demand is GRANTED.

DATED this 14th day of August, 1986.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge